

## **COUNCIL WORKSHOP**

### **Appeals of the Certification of Consistency by the California Department of Water Resources for the California WaterFix Project (Certification Number C20185)**

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**Summary:** The Council will conduct a public workshop to review and discuss a staff draft Determination related to appeals received on the California WaterFix project Certification of Consistency. Staff is presenting this version of the Determination to the Council, interested parties, and the public to discuss recommended edits and revisions prior to releasing a proposed Determination for Council consideration and action at a hearing during the December 20 - 21, 2018 Council meeting<sup>1</sup>.

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The Delta Stewardship Council (Council) will conduct a public workshop on November 15-16, 2018 to receive information from staff and seek input from interested parties and the public regarding a staff draft Determination prepared in response to appeals received on the Certification of Consistency with the Delta Plan submitted by the California Department of Water Resources (Department) for the California WaterFix project (Certification Number C20185). A copy of the staff draft Determination is provided as Attachment 1 to this report.

As summarized in the conclusion to this report and in the attached staff draft Determination, staff recommends that the Council conclude that substantial evidence does not exist in the record to support the Department's findings that California WaterFix is consistent with the Delta Plan. Staff further recommends that the Council remand the matter to the Department for reconsideration, pursuant to Water Code section 85225.25. No Council action will be taken at the November 15-16 workshop.

### **Background**

This report provides an overview of the Delta Reform Act and the requirements for the Council to develop and implement an enforceable long-term management plan for the Delta, the Council's covered action authority, and the certification and appeals process. We then discuss the covered action at issue here (California WaterFix), and the process and analysis completed by Council staff that led to the draft staff recommendation regarding the project certification and appeals.

The report concludes by describing the upcoming November 15-16 workshop.

### ***Delta Reform Act, Delta Plan and Covered Action Authority***

The Delta Reform Act of 2009 established that it was the policy of the State of California "to achieve the coequal goals of providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem." It further established that "the coequal goals shall be achieved in a manner that protects and enhances the unique cultural,

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<sup>1</sup> A public notice for the December 2018 Council hearing will be issued shortly.

recreational, natural resource, and agricultural values of the Delta as an evolving place.” (Water Code section 85054.)

The Delta Reform Act also stated that it was the policy of the State to “reduce reliance on the Delta in meeting California’s future water supply needs through a statewide strategy of investing in improved regional supplies, conservation, and water use efficiency.” (Water Code section 85021.)

The Delta Reform Act also established the Delta Stewardship Council in part to further the State’s policy goals by developing, adopting, and implementing a comprehensive management plan for the Delta (Delta Plan). The Act granted the Council specific regulatory and appellate authority over certain actions that take place in whole or in part in the Sacramento-San Joaquin Delta (Delta) and Suisun Marsh, which are referred to in the Act as “covered actions.”

The Council exercises that authority through the Delta Plan, which includes regulatory policies intended to meet objectives that the Legislature said were inherent in the coequal goals: manage the Delta’s water and environmental resources and the water resources of the State over the long term; protect and enhance the unique cultural, recreational, and agricultural values of the Delta as an evolving place; restore the Delta ecosystem; promote statewide water conservation and water use efficiency; improve the water conveyance system and expand statewide water storage; and reduce risks to people, property and State interests in the Delta.

State and local agencies are required to demonstrate consistency with these regulatory policies when carrying out, approving, or funding a covered action prior to initiating the implementation of that action, by submitting to the Council a written certification of consistency with detailed findings as to whether the covered action is consistent with the Delta Plan. (Water Code section 85225.) On July 27, 2018, the Department submitted a Certification of Consistency (Certification) to the Council regarding the California WaterFix.

### ***Certification and Appeals Process Overview***

The Delta Reform Act establishes a process for State and local public agencies to follow when determining whether a project is a covered action, as well as a process for submitting a certification of consistency with detailed findings to the Council. As part of this process, Department and Council staff conducted numerous early consultation meetings for the California WaterFix project. (See Water Code section 85225.5.) On July 17, 2018, the Department ended the early consultation process, and posted a draft copy of the Certification on its website for a 10-day public review period. The Council placed itself under ex parte communication restrictions on the same day. Ten days later, on July 27, 2018, the Department electronically submitted the Certification to the Council on its covered actions website, along with the corresponding record. The Department included public comments received during the 10-day review period within the record submitted to the Council. The Council notified interested parties on its listserv that the Certification was submitted and posted a copy of the notice on its webpage.

The Delta Reform Act allows any person who claims that a covered action is inconsistent with the Delta Plan and, as a result of that inconsistency, the action will have a significant adverse impact on one or both of the State’s coequal goals for the Delta or implementation of

government-sponsored flood control programs to reduce risks to people and property in the Delta, to file an appeal of a certification of consistency submitted to the Council. (Water Code section 85225.10, subdivision (a)). The Council received nine appeals of the California WaterFix project Certification, which staff deemed filed on August 27, 2018. (See Council Administrative Procedures Governing Appeals [Council Appeals Procedures] section 7.) The Department submitted additional items to the record, and certified the record complete on September 7, 2018. (See Council Appeals Procedures section 4, subdivision (b).)

Water Code section 85225.20 requires the Council to conduct a hearing on appeals within 60 days of the date of filing, and to make a decision on the appeal within 60 days of the hearing. The Council issued a notice of public hearing on September 14, 2018, followed by a September 28, 2018 supplemental notice containing questions to the Department and parties submitting appeals (appellants). The questions were intended to help the parties focus on specific substantial evidence in the record supporting their arguments. The Council then conducted a hearing on the appeals on October 24 – 26, 2018.

Hearing testimony and written responses received from the Department, the Delta Protection Commission (Commission), and appellants by October 15, 2018 are incorporated in the staff draft Determination. The Council is conducting today's workshop to receive information from staff, and seek input from the parties, the Commission, and the public regarding the staff draft Determination (Attachment 1) prior to releasing final proposed versions of that document for Council consideration and action at a hearing during the December 20-21, 2018 Council meeting.

### ***Proposed Project: California WaterFix***

The California WaterFix proposes large physical and operational improvements to the State Water Project in the Delta: new intake facilities in the north Delta, expanded south Delta intake facilities, and underground tunnels to connect the two.

The new north Delta intake facilities will consist of three separate intakes along the east bank of the Sacramento River between Clarksburg and Courtland. These fish-screened intakes will divert water through a complex sedimentation system before conveying it to two large tunnels. These tunnels, up to 40 feet in diameter, once complete will have the capacity to convey up to 9,000 cubic-feet per second. The water will travel by gravity through the tunnels to expanded south Delta intake facilities. These facilities will undergo physical improvements to isolate water flowing from the north Delta and manage the relative quantities diverted from the north and south. Diversions from existing south Delta facilities will also continue.

California WaterFix would enable the State Water Project to operate using a dual-conveyance system: water would primarily be diverted from the north Delta, with the option of diverting water from the south Delta based on conditions. The California WaterFix would also include mitigation measures, such as fish screens, habitat restoration, and management activities. The Department maintains that, through construction and mitigation, the California WaterFix could reduce the State Water Project's ongoing reliance on diversions from the south Delta, increase

the flexibility of operations in order to protect fish, and capture more water during times of high flow.

**Figure 1** on the following page identifies the project location and key project features.

It should be noted that the Department is completing several parallel and overlapping review and approval processes for the California WaterFix project. These include preparation of a Draft Supplemental Environmental Impact Report/Environmental Impact Statement (DSEIR/EIS) which the Department released in July 2018 that describes proposed project modifications; Change in Point of Diversion hearings before the State Water Resources Control Board (SWRCB hearings) dating back to 2015; and contract extensions related to the State Water Project (SWP) and California WaterFix (contracts) currently under consideration. To varying degrees, these ongoing processes are both referenced by appellants as part of the project description, and offered as evidence by the Department or appellants to support or challenge a finding of consistency with the Delta Plan.

The Department has submitted materials and testified that the project it has certified is limited to the California WaterFix project as described in the 2017 Final Environmental Impact Report/Environmental Impact Statement (FEIR/EIS). Thus, to the extent that the Department or appellants reference the DSEIR/EIS, documents or testimony submitted in the SWRCB hearings after July 27, 2018, and/or the contracts as a part of the project description under appeal, staff recommends that the Council not consider such arguments because the Department has not included them in the project description before the Council for consideration. The attached staff draft Determination identifies that review of the Certification based on the project presented to the Council at this time is not premature.

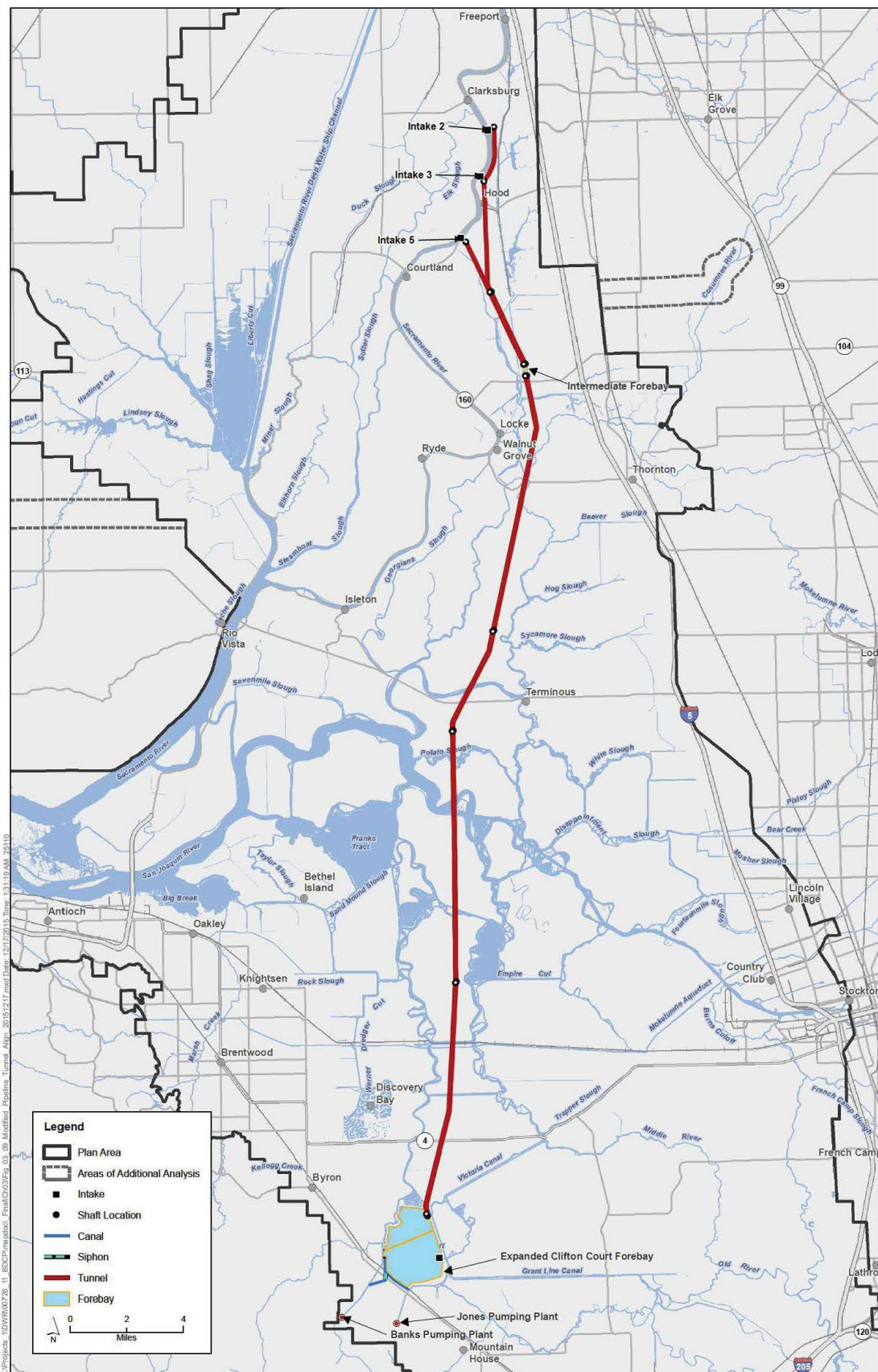
### ***Certification of Consistency***

After posting the draft Certification on its website for 10 days (See Council Appeals Procedures section 3), the Department submitted the Certification to the Council via its online system on July 27, 2018. The Certification is available on the Council's website at [https://coveredactions.deltacouncil.ca.gov/profile\\_summary.aspx?c=1790396c-5419-4ccb-b0d3-10cc4e985105](https://coveredactions.deltacouncil.ca.gov/profile_summary.aspx?c=1790396c-5419-4ccb-b0d3-10cc4e985105). The Department's Certification provides background and descriptive information about the project and offers an overview of the Department's detailed findings pertaining to consistency of the California WaterFix project with the Delta Plan. The Certification also discusses the relationship between California WaterFix and the coequal goals. In the Certification, the Department made findings regarding consistency with the Delta Plan regulatory policies as identified in **Table 1**.

The Certification cites to portions of the record that the Department offers as demonstrating substantial evidence in support of the Certification.



Source: Department of Water Resources



**Table 1: Department of Water Resources' Consistency Findings by Delta Plan Regulatory Policy**

| Delta Plan Policy                                 | Policy Title  | Department's Finding |
|---|---|----------------------|
| <b>G P1 (b)(2)</b><br>(23 CCR section 5002(b)(2)) | Detailed Findings to Establish Consistency with the Delta Plan (Mitigation Measures)    | Consistent           |
| <b>G P1 (b)(3)</b><br>(23 CCR section 5002(b)(3)) | Detailed Findings to Establish Consistency with the Delta Plan (Best Available Science) | Consistent           |
| <b>G P1 (b)(4)</b><br>(23 CCR section 5002(b)(4)) | Detailed Findings to Establish Consistency with the Delta Plan (Adaptive Management)    | Consistent           |
| <b>WR P1</b><br>(23 CCR section 5003)             | Reduce Reliance on the Delta through Improved Regional Water Self-Reliance              | Consistent           |
| <b>WR P2</b><br>(23 CCR section 5004)             | Transparency in Water Contracting   | Not Applicable       |
| <b>ER P1</b><br>(23 CCR section 5005)             | Delta Flow Objectives   | Consistent           |
| <b>ER P2</b><br>(23 CCR section 5006)             | Restore Habitats at Appropriate Elevations  | Consistent           |
| <b>ER P3</b><br>(23 CCR section 5007)             | Protect Opportunities to Restore Habitat  | Consistent           |
| <b>ER P4</b><br>(23 CCR Section 5008)             | Expand Floodplains and Riparian Habitats in Levee Projects                              | Consistent           |
| <b>ER P5</b><br>(23 CCR Section 5009)             | Avoid Introductions of and Habitat Improvements for Invasive Nonnative Species          | Consistent           |
| <b>DP P1</b><br>(23 CCR section 5010)             | Locate New Urban Development Wisely   | Not Applicable       |
| <b>DP P2</b><br>(23 CCR section 5011)             | Respect Local Land Use When Siting Water or Flood Facilities or Restoring Habitats      | Consistent           |
| <b>RR P1</b><br>(23 CCR section 5012)             | Prioritization of State Investments in Delta Levees and Risk Reduction                  | Consistent           |
| <b>RR P2</b><br>(23 CCR section 5013)             | Require Flood Protection for Residential Development in Rural Areas                     | Not Applicable       |
| <b>RR P3</b><br>(23 CCR section 5014)             | Protect Floodways   | Consistent           |
| <b>RR P4</b><br>(23 CCR section 5015)             | Floodplain Protection   | Consistent           |

### ***Appeals***

The nine appellants identified in **Table 2** submitted timely appeals of the Certification via the Council's online system, which Council staff deemed filed on August 27, 2018. **Table 2** also identifies Delta Plan policies substantively appealed by each appellant. Appellants substantively challenge the Certification's findings of consistency with 12 Delta Plan policies.

**Table 2: Appellants and Delta Plan Policies Appealed**

| Appeal Number | Appellant Group  | Delta Plan Policies Appealed   |
|---------------|--|--|
| C20185-A1     | North Coast Rivers Alliance, Institute for Fisheries Resources, Pacific Coast Federation of Fishermen's Associations, San Francisco Crab Boat Owners Association, Winnemem Wintu Tribe                                   | G P1(b)(2)<br>G P1(b)(3)<br>G P1(b)(4)<br>WR P1<br>ER P1<br>ER P2<br>ER P3<br>ER P5<br>DP P2 |
| C20185-A2     | Save the California Delta Alliance   | G P1(b)(2)<br>G P1(b)(3)<br>G P1(b)(4)<br>WR P1<br>WR P2<br>ER P1<br>DP P2                   |
| C20185-A3     | Friends of the River, California Sportfishing Protection Alliance, California Water Impact Network, Planning and Conservation League, AquAlliance, Environmental Water Caucus, Sierra Club California, Restore the Delta | G P1(b)(2)<br>G P1(b)(3)<br>G P1(b)(4)<br>WR P1<br>ER P1<br>ER P2<br>ER P3                   |
| C20185-A4     | North Delta CARES Action Committee   | DP P2  |
| C20185-A5     | City of Stockton   | G P1(b)(2)<br>G P1(b)(3)<br>WR P1  |
| C20185-A6     | Sacramento Regional County Sanitation District   | DP P2  |
| C20185-A7     | San Joaquin County, Contra Costa County, Solano County, Yolo County, Local Agencies of the North Delta   | GP 1(b)(2)<br>GP 1(b)(3)<br>GP 1(b)(4)<br>WR P1<br>WR P2<br>ER P1<br>DP P2<br>RR P1          |
| C20185-A8     | Central Delta Water Agency, South Delta Water Agency   | WR P1<br>ER P1   |
| C20185-A9     | County of Sacramento, Sacramento County Water Agency   | GP 1(b)(3)<br>GP 1(b)(4)<br>WR P1<br>DP P2   |

Numerous appellants also allege inconsistency with Delta Plan Policy **GP 1(b)(1)**. This policy requires that a covered action be consistent with each Delta Plan policy that it implicates, but recognizes that in some cases, based upon the nature of the covered action, full consistency

with all relevant regulatory policies may not be feasible. In those cases, the agency that files the certification of consistency may nevertheless determine that the covered action is consistent with the Delta Plan because, on whole, that action is consistent with the coequal goals.

The appeals are available on the Council's website at:

[https://coveredactions.deltacouncil.ca.gov/profile\\_summary.aspx?c=1790396c-5419-4ccb-b0d3-10cc4e985105](https://coveredactions.deltacouncil.ca.gov/profile_summary.aspx?c=1790396c-5419-4ccb-b0d3-10cc4e985105).

In addition to challenging the Department's Certification of Consistency with respect to Delta Plan regulatory policies, appellants also seek to supplement the Department's record, in accordance with Appeals Procedures sections 10 and 29. Staff's proposed draft Determination addresses these record requests for the Council's consideration.

As discussed in further detail in the draft staff Determination, the scope of the Council's review of the appeals is limited to whether or not the Certification submitted by the Department is supported by substantial evidence in the record before the Department (i.e., the "substantial evidence standard"). (Water Code section 85225.25.) Substantial evidence includes facts, reasonable assumptions based upon facts, and expert opinion supported by facts. It is reasonable, credible, and of solid value, representing evidence that a reasonable person might accept as adequate to support a conclusion. Substantial evidence does not include argument, speculation, unsubstantiated opinion or narrative, or evidence that is clearly erroneous or inaccurate. *Under this standard, the Council does not independently review the California WaterFix project to determine whether it is consistent with the Delta Plan.* The Council does not judge whether the Department made the "best" decision in its Certification.

The scope of the Council's review of consistency is also limited to the regulatory policies identified in the Delta Plan. The Council's authority related to covered actions does not extend to Delta Plan narrative, recommendations or performance measures, as none of these has regulatory effect.

The attached staff draft Determination addresses both procedural/legal issues presented by the parties and substantive issues raised by appellants regarding the Certification relative to each Delta Plan regulatory policy. To the extent possible, Council staff have consolidated similar issues and contentions presented by appellants, as described in the staff draft Determination.

## **Record**

The Department began providing portions of the record supporting the Certification to the Council via its online system on July 27, 2018. The Department supplemented the record during the following weeks and certified it as full and complete on September 7, 2018, 10 days after the appeals were deemed filed by the Council. The record consists of more than 26,000 individual documents that were before the Department when it made its Certification. As identified in the record index provided by the Department, these documents generally consist of decision documents (e.g., notices, approval resolutions, California Environmental Quality Act (CEQA) findings), environmental impact documents (e.g., environmental impact reports and permits), draft and final Certification documents, and public comments on the draft Certification received



by the Department during the 10-day review period. The record has been available to the public on the Council's covered actions website since submission.

Under the Administrative Procedures, the Council or executive officer may add to the record if either determines that there are relevant documents that were before the Department when it made the Certification, but which were not included in the Department's record. (Appeals Procedures section 10.) The Council may also take official notice of generally accepted technical or scientific facts which would be useful for the Council's appeal review. (Appeals Procedures section 29.)

On October 18, 2018, in response to a request from Save the California Delta Alliance, Executive Officer Jessica Pearson invoked section 10 of the Appeals Procedures, and determined that the complete docket of the SWRCB hearings through July 27, 2018 was "before" the Department when it filed its Certification, and ordered the Department to add that docket to the record for this proceeding. The Department objected on October 22, 2018, arguing that only select portions of the SWRCB record that it cited in its Certification were "before" it. In response, Executive Officer Pearson offered the parties the opportunity to brief the matter, with submissions due by October 29, 2018, at noon. After reviewing the timely filed briefs on the matter, on October 30, 2018, Executive Officer Pearson ordered the Department to add the entire SWRCB hearing docket through July 27, 2018, to the record.

The staff draft Determination contains additional recommended Council rulings on record-admission requests and objections from parties under sections 10 and 29 of the Appeals Procedures received through the October 26, 2018 hearing. Any requests received after that date will be addressed in staff's proposed Determination for Council consideration and action at the December hearing.

### ***Role of the Delta Protection Commission***

The Commission has an important advisory role in Council proceedings. Under Public Resources Code section 29773, the Commission may review and provide comments to the Council on any significant project or proposed project within the scope of the Delta Plan that may affect the unique cultural, recreational, and agricultural values within the primary and secondary zones. The Council's Administrative Procedures also allow for the Commission to address the Council regarding appeals during the required public hearing. (See section 11.)

The Council received a letter from the Commission on October 16, 2018 regarding the California WaterFix project. This letter is available on the Council's website (under "Party Submittals") at: [https://coveredactions.deltacouncil.ca.gov/profile\\_summary.aspx?c=1790396c-5419-4ccb-b0d3-10cc4e985105](https://coveredactions.deltacouncil.ca.gov/profile_summary.aspx?c=1790396c-5419-4ccb-b0d3-10cc4e985105). In its letter, the Commission offered comments and recommendations on Delta Plan Policies **DP P1**, **DP P2**, and **G P1**, related to cultural landscapes, cultural resources, legacy communities, recreation, and agriculture<sup>2</sup>. The Commission also expressed concern regarding how the Department engaged with communities and consulted with local agencies

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<sup>2</sup> It should be noted that while the Commission offers recommendations to the Council regarding Delta Plan Policy **DP P1**, Locate New Urban Development Wisely (23 CCR section 5010), no appellant challenged the Certification as inconsistent with this Delta Plan policy.

and the Commission regarding local land use and economic sustainability policies. The Commission also addressed the Council regarding these concerns at the public hearing described below.

Public Resources Code section 29773, subdivision (b) requires the Council to “take into consideration” Commission recommendations. If the Council, in its discretion, determines that a Commission recommendation “is feasible and consistent with the objectives of the Delta Plan,” the Council shall adopt the recommendation. Where applicable, the staff draft Determination discusses Commission comments considered by the Council related to appeals issues previously raised by appellants.

### ***Hearing***

On September 14, 2018, the Council issued a Notice of Public Hearing regarding the appeals for a hearing to be held on October 24-26, 2018 at the Ramada Inn in West Sacramento. In the Notice, the Council stated that it might issue additional guidance prior to the hearing in order to assist the parties in focusing their written and oral hearing presentations. On September 28, 2018, the Council issued a Supplement to the Notice of Public Hearing to the Department and appellants, requesting that in their written submittals they address certain questions identified by staff in its initial review of the appeals. The Department and appellants provided written responses to those questions on or around October 16, 2018. These responses are available on the Council’s website (under “Party Submittals”) at:

[https://coveredactions.deltacouncil.ca.gov/profile\\_summary.aspx?c=1790396c-5419-4ccb-b0d3-10cc4e985105](https://coveredactions.deltacouncil.ca.gov/profile_summary.aspx?c=1790396c-5419-4ccb-b0d3-10cc4e985105). Numerous interested parties also sent the Council comment letters both in favor of and in opposition to the project in advance of, at, and following the hearing. These letters are available on the Council’s website (under “Public Comments”) at: [https://coveredactions.deltacouncil.ca.gov/profile\\_summary.aspx?c=1790396c-5419-4ccb-b0d3-10cc4e985105](https://coveredactions.deltacouncil.ca.gov/profile_summary.aspx?c=1790396c-5419-4ccb-b0d3-10cc4e985105).

At the hearing, the Department, most appellants, the Commission, and other persons provided written and/or oral testimony regarding the Certification and appeals. Transcripts of the hearing will be available on the Council’s website approximately 14 days following completion of the hearing. Video of the October 24–26, 2018 hearing is available at: <http://cal-span.org/static/meetings-DSC.php>.

### ***Proposed Staff Draft Determination***

At the conclusion of the hearing, Presiding Officer Chair Randy Fiorini directed Council staff to prepare draft findings regarding the appeals based on the record and comments received, and to schedule a public workshop to receive input on the draft findings. The Council announced the possibility of a workshop in the September 14, 2018 notice for the public hearing, and formally noticed today’s workshop on October 29, 2018. Staff released the attached draft Determination for public review as soon as possible after the hearing, on November 8, 2018. The notice states that the public comment period on the staff draft Determination will remain open through Monday, November 19 at noon.

For each substantive issue identified on appeal, staff reviewed and considered the Department's Certification, the relevant appeals, the supporting record, parties' written responses to the Council's Supplemental Notice (i.e. questions to the parties), oral testimony offered by the Department, appellants, Commission, and public comments. Applying the substantial evidence standard of review, in the attached draft Determination staff has prepared proposed findings for each substantive challenge to the Certification raised on appeal.

Staff's draft findings related to the 12 Delta Plan policies implicated by appeals are:

- the Department fails to demonstrate substantial evidence in the record to support its Certification's findings that the California WaterFix project is consistent with five (5) Delta Plan policies,
- appellants fail to demonstrate that the Department's record lacks substantial evidence in support of its Certification with respect to four (4) Delta Plan policies, and
- appellants fail to demonstrate that three (3) policies apply to the California WaterFix project.

Staff's findings for each appealed Delta Plan policy are summarized in **Table 3** below.

**Table 3: Preliminary Council Staff Findings for Staff Draft Determination by Delta Plan Policy**

| Delta Plan Policy   | Substantial Evidence Supports Department's Certification? <sup>1</sup> |
|---|--|
| <b>G P1 (b)(1)</b> (23 CCR section 5002(b)(1))<br>Detailed Findings to Establish Consistency with the Delta Plan (Coequal Goals)  | <b>No</b>  |
| <u>GP 1(b)(1) Summary:</u> The Department asserts infeasibility under Policy GP 1(b)(1) as an alternative approach to consistency for numerous policies within its Certification, but at the October 25, 2018 hearing, the Department clarified that it wishes to invoke these provisions for only two Delta Plan policies – Policy DP P1 and Policy WR P1. No appeal has asserted inconsistency with Policy DP P1. With regard to Policy WR P1, as discussed under that policy below, the Department states that consistency with the policy is infeasible due to water management planning statutory requirements, the limits of the Department's authority, and the difficulty in either creating or assembling certain data required by the policy. The staff draft Determination concludes that none of these reasons supports a determination of infeasibility. |  |
| <b>G P1 (b)(2)</b> (23 CCR section 5002(b)(2))<br>Detailed Findings to Establish Consistency with the Delta Plan (Mitigation Measures)  | <b>Yes</b>   |
| <u>GP 1(b)(2) Summary:</u> Appellants fail to demonstrate that the Department's record lacks substantial evidence in support of its Certification. The Department provides information in the FEIR/EIS and a mitigation crosswalk between Delta Plan mitigation measures and California WaterFix project mitigation measures. Appellants assert that the Department's measures are  |  |

| Delta Plan Policy  | Substantial Evidence Supports Department's Certification? <sup>1</sup> |
|--|--|
| vague and unenforceable, are deferred, do not address water quality impacts to the City of Stockton, or are not comparable. However, the assertions regarding vagueness and enforceability do not undermine substantial evidence offered by the Department in support of the equivalency of its mitigation measures with those adopted by the Council. Many of the Council's required measures must be implemented prior to construction, not at time of certification. There is no Delta Plan measure specific to water quality impacts to Stockton; and, substantial evidence supports that California WaterFix project mitigation measures are comparable to Delta Plan mitigation measures.                  |  |
| <b>G P1 (b)(3)</b> (23 CCR section 5002(b)(3))<br>Detailed Findings to Establish Consistency with the Delta Plan (Best Available Science)  | <b>No</b>  |
| <u>G P1 (b)(3) Summary:</u> The Department fails to demonstrate substantial evidence in the record to support its findings that California WaterFix is consistent with the Delta Plan's Best Available Science timeliness criterion. Substantial evidence in the record demonstrates that updated climate change information was reasonably available to the Department before it released its Draft Environmental Impact Report/Environmental Impact Statement (DEIR/EIS) and FEIR/EIS for the project, and the Department has not supported its conclusion in the Certification that such updated information would not have changed its projections, impact analyses, or management decisions.                |  |
| <b>G P1 (b)(4)</b> (23 CCR section 5002(b)(4))<br>Detailed Findings to Establish Consistency with the Delta Plan (Adaptive Management)   | <b>Yes</b>   |
| <u>G P1 (b)(4) Summary:</u> Appellants fail to demonstrate that the Department's record lacks substantial evidence in support of its Certification. In some cases, appellants make general allegations regarding adaptive management, but fail to allege inconsistency with the Council's adaptive management policy requirements outlined in Delta Plan Appendix 1B. In other cases, issues raised by appellants address perceived deficiencies in only one component of the Department's submittal (the Biological Opinion Adaptive Management Plan), which are adequately addressed in other parts of the Project-wide Adaptive Management Plan (PAMP) the Department submitted as part of its Certification. |  |
| <b>WR P1</b> (23 CCR section 5003)<br>Reduce Reliance on the Delta through Improved Regional Water Self-Reliance   | <b>No</b>  |
| <u>WR P1 Summary:</u> The Department fails to identify substantial, quantitative evidence demonstrating that water suppliers receiving water as a result of the project have adequately contributed to reduced reliance on the Delta through improved regional self-reliance and that this failure did not significantly cause the need for the project.<br><br>The Department provides extensive information regarding efforts that certain water suppliers have undertaken to reduce their reliance on the Delta. Appellants argue that California   |  |

| Delta Plan Policy   | Substantial Evidence Supports Department's Certification? <sup>1</sup> |
|---|--|
| <p>WaterFix must satisfy the specific requirement of subdivision (a)(1) of the policy, including required quantitative data, in order to be consistent.</p> <p>The Department also states that the need for California WaterFix was not significantly caused by a failure to adequately reduce reliance, but rather by factors that pre-date and exist independently of the reduced reliance policy. Appellants dispute this conclusion, contending that Delta exports resulted in the environmental problems that DWR now maintains are causing the need for California WaterFix.</p> <p>Finally, the Department states that the export of water will not have a significant adverse environmental impact because the volume of Delta exports would remain about the same or decrease slightly compared to exports under existing conditions. Appellants dispute this by taking issue with the volume of projected exports and the Department's assertion that no significant change in the amount of water exported will ensure that the project will not have significant adverse environmental impact in the Delta. In its supplemental response to hearing questions, the Department notes that California WaterFix will have a significant adverse environmental impact due to the project's effect on the earliest stages of American Shad and striped bass.</p> |  |
| <p><b>WR P2</b> (23 CCR section 5004)<br/> Transparency in Water Contracting</p>  | <p>n/a</p>   |
| <p><u>WR P2 Summary:</u> The State Water Project Contract Amendments are not part of the project description certified by the Department, therefore WR P2 does not apply. When the Department takes action on the contract amendments, the Council's expectation is that the Department will submit a certification of consistency, assuming the contract amendments satisfy the criteria for covered actions.</p>  |  |
| <p><b>ER P1</b> (23 CCR section 5005)<br/> Delta Flow Objectives</p>  | <p><b>No</b></p>   |
| <p><u>ER P1 Summary:</u> The Department fails to demonstrate substantial evidence in the record to support its findings that the project is consistent with the Delta Plan with respect to Delta flow objectives. The Certification offers two main sources of evidence: modeling studies and a historical record of compliance. Appellants assert that the Department does not comply with the SWRCB Decision 1641 (D-1641) export/inflow ratio requirement and does not account for relaxation of water quality standards when reporting historic compliance, among other issues. The historical record is meant to show that the Department can use real-time operations to meet water quality standards at a greater rate than suggested by monthly models. However, neither the models nor the historical record demonstrate compliance with SWRCB Decision 1641 (D-1641), which is the applicable Delta flow objective at the time of certification. In addition, the Department's model provides no evidence that California WaterFix would be operated to meet D-1641's export/inflow ratio with the inflow measured at Freeport, as required by D-1641.</p>  |  |



| Delta Plan Policy   | Substantial Evidence Supports Department's Certification? <sup>1</sup> |
|---|--|
| <b>ER P2</b> (23 CCR section 5006)<br>Restore Habitats at Appropriate Elevations  | n/a  |
| <u>ER P2 Summary:</u> The Department's certification commits to fulfill habitat restoration obligations described in multiple Environmental Commitments included as part of the project description. The Certification does not identify the specific locations for all of the commitments, as the Department has not settled upon the appropriate sites yet, and therefore it is not possible to document the elevation being proposed for each specific site. When the Department selects sites and is prepared to undertake habitat restoration activities, the Council's expectation is that the Department will submit certifications of consistency for those activities, assuming they satisfy the criteria for covered actions. Therefore, Policy ER P2 does not apply to the project before the Council.   |  |
| <b>ER P3</b> (23 CCR section 5007)<br>Protect Opportunities to Restore Habitat  | Yes  |
| <u>ER P3 Summary:</u> Appellants fail to cite substantial evidence demonstrating that a reduction of freshwater flows or mitigation measures for temporary project impacts would result in significant adverse impacts to opportunities to restore habitat. The Department acknowledges both temporary and permanent project impacts to Priority Habitat Restoration Areas as defined in Policy ER P3. However, the Department demonstrates substantial evidence that sites affected by temporary project impacts would be returned to previous conditions, and that permanent project impacts would not result in a significant adverse impact to the opportunity to restore habitat.  |  |
| <b>ER P5</b> (23 CCR Section 5009)<br>Avoid Introductions of and Habitat Improvements for Invasive Nonnative Species  | Yes  |
| <u>ER P5 Summary:</u> Appellants fail to demonstrate substantial evidence in the record that the California WaterFix project does not consider the potential for new introductions of nonnative invasive species to occur. The Department acknowledges potential for project construction and habitat restoration actions to open new habitat to nonnative invasive species already present in the system. However, through numerous enforceable commitments, mitigation measures, permit requirements, habitat restoration adaptive management actions, and invasive species programs, the Department demonstrates substantial evidence that it has considered and will avoid new introductions, including a specific barge operations plan, monitoring requirements, and a commitment to fund efforts by the Division of Boating and Waterways to treat invasive aquatic vegetation in the Delta. |  |
| <b>DP P2</b> (23 CCR section 5011)<br>Respect Local Land Use When Siting Water or Flood Facilities or Restoring Habitats  | No   |
| <u>DP P2 Summary:</u> The Department fails to demonstrate substantial evidence in the record to support its findings that the project is consistent with respect to compatibility with local land use plans, conflicts with land uses in existing Delta communities, conflicts with existing land   |  |

| Delta Plan Policy  | Substantial Evidence Supports Department's Certification? <sup>1</sup> |
|--|--|
| <p>uses due to impacts on cultural and historical resources, conflicts with existing Delta parks and recreation uses, traffic impacts, and conflicts with existing land uses due to noise impacts. For many of these issues, the Department finds that the project would result in significant and unavoidable impacts. Such findings may be sufficient for purposes of compliance with the California Environmental Quality Act (CEQA). However, they do not necessarily demonstrate that the Department has reduced the resulting conflicts with existing or planned Delta land uses to the extent feasible, as the Delta Plan requires.</p> <p>The Department's Certification also acknowledges project impacts to visual and aesthetic resources, public health and hazards, and wastewater discharge facilities. For these issues, the Department identifies substantial evidence in the record showing how the project would avoid or reduce resulting conflicts to the extent feasible. In addition, the Department identifies substantial evidence in the record showing consideration of comments from reclamation districts.</p> <p>Regarding Delta agricultural land conflicts, appellants fail to demonstrate that the Department's commitments to prepare Agricultural Land Stewardship Plans (ALSPs) and other related commitments are not substantial evidence supporting its certification. Where feasible, these commitments would avoid and reduce conflicts related to agricultural land conversion through working with farmers to continue agricultural production during construction, restoring agricultural land after construction, and offering financial and technical support for best management practices on farms. It should be noted that these measures only reduce and avoid conflicts associated with farmland conversion. They do not address other community land uses or economic conditions in legacy Delta communities that rely on agriculture. On this latter topic, the Department fails to demonstrate substantial evidence in the record to support its findings.</p> |  |
| <p><b>RR P1</b> (23 CCR section 5012)<br/> Prioritization of State Investments in Delta Levees and Risk Reduction</p>  | <p>n/a</p>   |
| <p><u>RR P1 Summary:</u> The Department finds that the project is consistent with Policy RR P1. Appellant San Joaquin County, et al., asserts that the project is inconsistent with a portion of the state investment priorities set forth in Policy RR P1, and thus is inconsistent with the policy as a whole. The staff draft Determination recommends that the Council find that Policy RR P1 does not apply, because the project is neither a flood risk management project, nor a discretionary state investment as described in the policy. Specifically, California WaterFix is not a flood risk management project, since the project objectives do not include managing flood risk and any modifications to levees would be completed to ensure that there will be no change in flood risk as a result of the project. Moreover, California WaterFix is not a discretionary state investment, since it will not be funded by programs designed to improve Delta flood risk management, but instead by participating water contractors.</p>   |  |

Note:

1. No = Department failed to demonstrate substantial evidence in the record to support its findings  
Yes = appellants failed to demonstrate that the Department's record lacked substantial evidence  
n/a = appellants failed to demonstrate that the policy applies to the project

### **Staff Recommendation**

Because the Department failed to demonstrate consistency with aspects of Delta Plan Policy **G P(1)(b)(1)**, Delta Plan Policy **G P(1)(b)(3)**, Delta Plan Policy **WR P1**, Delta Plan Policy **ER P1**, and Delta Plan Policy **DP P2**, staff recommends that the Council remand the matter to the Department for reconsideration, pursuant to Water Code section 85225.23.

### **Today's Workshop**

Today's workshop provides an opportunity to affirm or modify the staff draft Determination prior to considering and taking action on a proposed Determination at the hearing during the December 20-21, 2018 Council meeting. At the workshop, Council staff will summarize the Certification and appeals process for the California WaterFix project; and present the content of the staff draft Determination for each applicable regulatory policy, including staff's recommended findings. That presentation will also include staff's recommendations for addressing (1) legal arguments raised by the parties that do not apply to specific Delta Plan policies, and (2) record-admission requests. Following the staff presentation, the Department, the Commission, and each appellant will have an opportunity to address, and respond to questions from, the Council. No action will be taken by the Council at the workshop.

Throughout the remainder of the workshop, staff will be available to the Council to answer questions about the draft findings and discuss potential modifications to staff's draft Determination. Members of the public will have an opportunity to address the Council after Council discussion. Following public comment, the Council may provide direction to staff to prepare a proposed Determination for consideration and decision at its hearing during the December 20-21, 2018 meeting. That proposed Determination will be circulated for public review in advance of the December meeting.

### **Fiscal Information**

Not applicable.

### **List of Attachments**

*Attachment 1: Staff draft Determination Regarding Appeals of the Certification of Consistency by the California Department of Water Resources for California WaterFix*

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